

ADVOCACY AND THE LITIGANT IN PERSON

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INTRODUCTION

1. Advocacy is the art of persuasion. As barristers, we practice that art within the framework of the rules and practices of civil and criminal litigation. One of the characteristics of that framework is that our opponents are usually other lawyers who know, or are presumed to know, those rules and practices.
2. A litigant in person (**LIP**) presents a different challenge. In most cases, an LIP will not know the rules and practices, will know them imperfectly or will utterly (or willfully) misunderstand them. LIPs are not bound by ethical rules. They often do not play by the rules, sometimes quite deliberately.
3. And they are not always easily defeated. Chief Justice Dixon's last case was an appeal in the High Court from a judgment for libel in favour of an ex-jockey, who announced his appearance with "*I appear for meself*". Even the great Dixon could only swing two of the five members of the Court in that case.¹ It is reported that the jockey gained the Court's sympathy,² and the writer detects a note of sympathy in the majority judgment.
4. Further, cases involving LIPs present particular challenges for the judge. Some LIPs can test the patience of even the most temperate judicial officers. LIPs also make the tribunal's task more difficult by creating a situation where the other side of the case is rarely properly developed. Judges are the focus of the barrister's advocacy: their challenges become our challenges.
5. For all these reasons, dealing with an LIP throws up a number of novel issues which the advocate must take into account in conducting his or her case, both in an ethical manner and to the best advantage of his or her client. The purpose of this paper is to identify some of those issues. The focus is on commercial litigation but the observations apply in most cases.

¹ *The Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254

² G. Lindsay SC, *Review of Owen Dixon: A Biography* (2003) 23 Aust. Bar Rev. 198

SIZING UP YOUR OPPONENT

6. It is important when dealing with an LIP to try to obtain some insight into their character and motivation. This will affect how the advocate approaches his or her task. This really only comes with experience of LIPs in particular and people in general. However here are some categories to look out for.
7. Perhaps the most well-known category of LIP (though not the most common kind encountered) is the so-called 'querulous' litigant or 'vexatious' litigant. The querulous litigant is one who is obsessed with a particular issue or grievance.
8. Some querulous litigants pursue an issue like a modern day Don Quixote, tilting at constitutional or legal windmills. Challenges to the validity of paper money were for a long time the quest of a number of LIPs. They will pay no attention to any judgment contrary to their set views, but otherwise can be pleasant to deal with.
9. More common is the querulous litigant driven by a personal grievance, real or imagined. The writer's experience is that such obsessive grievance often emerges from the failure of some grand financial scheme or the loss of face as a result of failed financial dealings. The humiliation of the loss of the family farm can be such a catalyst.
10. The querulous litigant has been described by one psychiatrist in the following terms³:

At times, these chronic grumblers may become 'querulant' (morbid complainants). In general, they have a belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss was personalised and directed towards them in some way. They have over-optimistic expectations for compensation, over-optimistic evaluation of the importance of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self or others). There will be evidence of significant and increasing loss in life domains, driven by their own pursuit of claim. Over time, they begin to pursue claims against others involved in the management of claims, be it their own legal counsel, judges and other officials. While claiming a wish for compensation initially, any such offers never satisfy and their claims show an increasing need for personal vindication and, at times, revenge, rather than compensation or reparation.

Despite 150 years of psychiatric research into querulous paranoia, there is no consensus as to the underlying pathology. Theories range from an underlying organic disease process, similar to schizophrenia, through to psychogenic processes; that is, certain vulnerable characters are sensitised by certain life experiences and are then struck by a key event which triggers their complaining. Preceding the querulousness, they have often received some form of blow to their individual sense of self-esteem or security. This was often in the nature of a loss of relationship, through separation or death, ill health or loss of employment.

The key event is usually a genuine grievance and seems to echo previous losses. The key event is often of a type to threaten the (male) status symbols of prestige, position, power, property and rights. Environmental factors influence their complaint.

³ Dr G. Lester, *The Vexatious Litigant* (2005) 17 *Judicial Officers' Bulletin* 17 at 18-19 cited by Douglas J in *Access to Justice-Problems of Self-Representation* Hearsay Issue 55

11. This kind of LIP has to be treated with particular caution by the advocate, both outside Court and before the Court.
12. A further category of LIP the writer has observed is what might be called the misguided or misled LIP. Litigants in this category comprise people who have obtained informal advice, usually from persons without legal qualifications, who assure them that they have a defence to a particular kind of claim (frequently tax claims or claims relating to mortgage securities and money lending). These defences are usually based on some obscure and wrong point of law, though to the hopeful and untrained litigant they look impressive.
13. The internet age has made this situation more common. In some cases, the LIP will have paid for the advice, which often takes the form of a draft court document. People who fall for this kind of thing are usually more gullible than malicious.
14. Finally, and importantly, many LIPs are people who simply cannot afford legal representation or for whom the risk posed by the litigation does not justify the cost of legal representation. An example of the latter is the appellant in *Ross v Hallam* [2011] QCA 92, who only belatedly realised (in the Court of Appeal) that defending himself was beyond him.
15. The categories I suggest are neither exhaustive, nor mutually exclusive. However, in each case, it is helpful to try to get some insight into the background of your opponent and their motivation and character. A name search can be helpful to find out if your opponent has form. Also worth trying is a phrase search of some of the more unusual turns of phrase which might appear in a particularly odd looking court document. This might turn up previous cases where usual contentions have been run before and dismissed.
16. A discussion before Court with your opponent can also assist in trying to understand the kind of opponent you confront. Care must be taken in those discussions, however, as I will now discuss.

SOME PARTICULAR ETHICAL CONSIDERATIONS⁴

17. There are a number of ethical rules which acquire particular importance when dealing with an LIP.
18. Rule 28 *Barristers' Conduct Rules 2011* (the **Rules**) provides:

⁴ For this part of the paper, the writer is indebted to the publication *Self-represented litigants: Guidelines for Barristers* published by QPILCH and available at http://www.qpilch.org.au/_dbase_upl/15.07.23_Self-represented_litigants_Guidelines_for_barristers.pdf and *Guidelines for Barristers on Dealing with Self-Represented Litigants* published by the NSW Bar Association and available at http://www.nswbar.asn.au/docs/webdocs/self_reps_14112011.pdf. (the **NSW Guidelines**)

A barrister must alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the barrister contrary to the true position and is believed by the barrister to have been made by mistake.

19. This rule attains particular significance where the opponent is an LIP. A certain amount of additional vigilance is required in that context, not only to ensure that the barrister does his or her duty, but to ensure that there is no good basis laid for an appeal.
20. The writer's prescription for the advocate in most LIP cases is to be fair, almost to a fault, in pointing out both sides of any reasonable argument which can be discerned in the LIP's material. Judges have a difficult time of it with LIPs and the best strategy for enduring success is usually to make an effort to assist and reassure, while fairly putting your own client's case.
21. Rule 44 of the Rules also attains an added piquancy when dealing with an LIP. It provides:

A barrister must not in the presence of any of the parties or solicitors deal with the court on terms of informal personal familiarity which may reasonably give the appearance that the barrister has special favour with the court.
22. An LIP is usually stressed when appearing before the Court (though not always: some experienced LIPs present with a confidence bordering on hubris: Nemesis is usually not far away in such cases). Some already subscribe to conspiracy theories. Others will leap on any excuse to allege bias or ill-treatment. Even ordinary courtesies can be misunderstood. It is particularly important, therefore, to maintain rigorous formality in hearings involving an LIP. This will tend to reduce complaints about unfair treatment.
23. Perhaps most important to keep in mind is Rule 52. It provides:

A barrister must not confer with or deal directly with any party who is unrepresented unless the party has signified a willingness to that course.
24. Applied literally, this precludes discussions between counsel and the LIP without the LIP's consent. It is useful to have discussions with the LIP opponent before Court and almost impossible properly to prepare for a hearing without doing so. The writer considers that the Court will expect you to do so, to try and smooth the way.
25. My experience, and the experience of others I have spoken to, is that most LIPs are willing, even keen, to talk to you. However, it is a salutary practice to introduce yourself, clearly identifying yourself as counsel and the party you represent, and asking if you may speak to the person. And always have your solicitor present. That is not of course the only way to do it. Another colleague tries to avoid ever speaking directly to the LIP, preferring to do it through his solicitor.

26. Some LIPs will refuse. If they do, it is best to respect that refusal and let the matter play out in Court. At least you can inform the Court that you have tried to discuss matters if the issue comes up.

THE ROLE OF THE JUDGE

27. In the writer's view, perhaps the most important consideration for the advocate opposed to an LIP is to understand the role assigned to the judge in such cases.
28. The Court's duty when conducting a proceeding involving an LIP has been the subject of numerous cases in intermediate Courts of Appeal⁵ and in the High Court.⁶ It is generally recognised in the authorities as comprising a duty to ensure a fair trial, despite the shortcomings of the LIP. The formulation of this 'duty to assist', varies from case to case.
29. A prescriptive approach is found in *In Marriage of F* where, after extensive review of the authorities, the Full Court of the Family Court made the following observations⁷:

Finally, we think it useful to list the set of guidelines as altered by our consideration of them above.

10. A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;
11. A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;
12. A judge should explain to the litigant in person any procedures relevant to the litigation;
13. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;
14. If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;
15. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;
16. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;
17. A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (*Neil v Nott* [1994])

⁵ Recent cases include *Rajski v Scitec Corporation Ltd* (Unreported NSWCA No 146 of 1986) at pp 14 and 27 (frequently cited in later cases); *Minogue v HREOC* (1999) 84 FCR 438 at [26] to [33]; *In Marriage of F* (2001) 161 FLR 189 at 215-227 (Full Court of the Family Court); *McWhinney v Melbourne Health* (2011) 31 VR 285 at [20] to [26]; *Hamond v NSW* [2011] NSWCA 375 at [309] to [316], approved and applied by the Full Court of the Federal Court in *Szrur v Minister for Immigration* 216 FCR 445 at 452- 454; *Trkulja v Markovic* [2015] VSCA 298; *Ross v Hallam* [2011] QCA 92 at [12]-[13] and [18] to [22]

⁶ *Neill v Nott* (1994) 121 ALR 148

⁷ At [253]: the Court seems to have started its list at 10 because it supplanted a previous list in an earlier case which finished at 9.

HCA 23; (1994) 121 ALR 148 at 150);

18. Where the interests of justice and the circumstances of the case require it, a judge may:

- draw attention to the law applied by the Court in determining issues before it;
- question witnesses;
- identify applications or submissions which ought to be put to the Court;
- suggest procedural steps that may be taken by a party;
- clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

30. This prescriptive approach was based in part upon the particular considerations which arise in cases involving children, though was not limited to those cases. Other cases adopt a less prescriptive approach, formulating propositions in more general terms.

31. A frequently cited⁸ early statement of general principle appears in *Rajski v Scitec Corporation Pty Ltd*⁹ in which case:

(a) Samuels JA observed:

In my view, the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers (1999) 166 ALR 129 at 137 to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent ... At all events, the absence of legal representation on one side ought not to induce a court to deprive the other side of one jot of its lawful entitlement ... An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status, would be quite unfair to the represented opponent.

(b) And similarly, Mahoney JA observed:

Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done.

32. Another statement of general principle is that by Bell J in *Tomasevic v Travaglini* (2007) 17 VR 100 at [141] to [142]¹⁰ where his Honour said:

139 Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are

⁸ See the references in *Minogue v HREOC* (1999) 166 ALR 129 at [28]

⁹ (Unreported NSWCA No 146 of 1986)

¹⁰ Approved by the Victorian Court of Appeal in *McWhinney v Melbourne Health* at [25]-[26]

fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

140 Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.

141 The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.

142 The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances - it must ensure a fair trial, not afford an advantage to the self-represented litigant.

33. Another useful statement of general principle appears in *Trkulja v Markovic*¹¹, where the Victorian Court of Appeal held (in terms echoing *Tomasevic*) (footnotes omitted):

36 Some cases have described the judge's duty in terms that suggest that it is owed to the self-represented litigant while others have more accurately described it as a general duty which is inherent in the discharge of the judicial function.

37 Whatever the rationale for the judge's duty may be, it is clear that the boundaries of legitimate judicial intervention are flexible and will be influenced by the need to ensure a fair and just trial. It follows that what a judge must do to assist a self-represented litigant depends on the circumstances of the litigant and the nature and complexity of the case. The circumstances of the litigant include his or her age, physical and mental health, level of education, proficiency in the English language, level of intelligence, personality and experience as well as his or her understanding of the case.

38 The judge may also take into account whether a self-represented litigant is legally qualified or has had prior experience in litigation and whether it may be inferred from his or her qualifications or experience that he or she has a working knowledge of the substantive area of law that he or she is litigating and applicable court procedure. A further relevant consideration is whether another party to the litigation, whose interests are aligned with those of the self-represented party, is represented and is able to provide assistance to the self-represented party.

39 In determining the proper scope of assistance to be offered to a self-represented litigant, the touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed. In some cases, it may be necessary for the judge to identify the issues and the state of the evidence in relation to them so as to enable the self-represented litigant to consider whether he or she wishes to adduce evidence. It is elementary that a judge ought to ensure that the self-represented litigant understands his or her rights so that he or she is not unfairly disadvantaged by being in ignorance of those rights. Notwithstanding this, the judge should refrain from advising a litigant as to how or when he or she should exercise those rights.

¹¹ [2015] VSCA 298

40 The High Court has stated that a frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy. Similarly, this Court has endorsed the proposition that '[c]oncealed in the lay rhetoric and inefficient presentation may be a just case'.

41 It is clear that a judge cannot become the advocate of the self-represented litigant. This is because the role of a judge is fundamentally different to that of an advocate. Further, a judge must maintain the reality and appearance of judicial neutrality at all times and to all parties. Accordingly, the restraints upon judicial intervention stemming from the adversary tradition are not relevantly qualified merely because one litigant is self-represented.

34. There is clear authority for the Judge to explain purely procedural matters to an LIP. Beyond that, what is to be done in a particular case will depend on the particular circumstances. In the words of the Full Federal Court in *Minogue*,¹² this leaves the trial judge facing something of a dilemma. He or she needs to ensure a fair trial. He or she must do this by assisting the LIP sufficiently, but not too much, such that the trial is as fair as possible while not unduly disadvantaging the represented party and avoiding the impression that the Court is not impartial. It is a delicate balancing exercise which can only be undertaken against the backdrop of the particular facts of each case.
35. It is worth observing, however, that there is no absolute prohibition on the Court advising on substantive points of law. The High Court in *Neil v Nott* found, in effect, that it was the trial judge's duty in that case:
- (a) To identify that the relief which Mr Neil *should* have sought was an extension of time to bring a Family Provision Application (even though Mr Neil did not ever seek that relief, never filed an application and pursued utterly unrelated matters on the hearing);
 - (b) To identify (from the extensive material filed) the three relevant pieces of evidence in favour of such an application; and
 - (c) To grant the application.
36. The trial judge's dilemma also confronts the advocate. It is counsel's duty to assist the Court, including (in the writer's view) assisting with navigating the shoals and reefs of the 'duty to assist'. Further, it is the writer's view that it is good advocacy to assist the Court with these issues. It gives the Court confidence that the advocate is not going to conduct the matter in a way which leads the Court into error.¹³ On the other hand, it is important to advance the interests of counsel's own client.
37. How to balance these competing duties? A couple of suggestions are offered:

¹² (1999) 166 ALR 129 at [29]

¹³ *Advocacy Notes* (1998) 17 Aust. Bar Rev. 101 observes that advocacy generally requires, inter alia, "that the advocate must be trusted by the decision-maker as a person who can be relied upon to act competently and honourably, enabling all concerned to concentrate on the topic under consideration without being distracted by doubts about the advocate's personal qualities or lack of them."

- (a) **First**, the advocate can adopt the approach of identifying the matters which can be advanced by the LIP on material points, then answer them on behalf of his own client. It is not necessary to advance the case of the LIP at its highest, but rather to draw attention to it, then make submissions to rebut it with vigour.
- (b) **Second**, the advocate should keep a weather eye out for key procedural or tactical blunders by the LIP which have a significant effect on the outcome of the case. These are the ones likely to give rise to successful appeals.¹⁴ In those cases, a judgment has to be made whether to make a submission about the course being adopted by the trial judge. In making that judgment, it is worth keeping in mind the following observation in the NSW Guidelines at paragraph 2 (footnotes omitted):

Subject to their paramount duty to the administration of justice, a barrister's primary duty is to their client. A barrister should, however, exercise their own forensic judgment and give advice independently and in accordance with their paramount duty to the administration of justice, notwithstanding any contrary wishes of their client. The import of these guidelines is that the long term interests of barristers' clients are best served by the facilitation of a fair hearing. There is little or no point, for example, in achieving a successful result for a client which is set aside on appeal for want of natural justice or procedural fairness to a self-represented litigant.

38. It is a point of some interest, in the writer's view, as to where the advocate's duty lies when the advocate considers that an obvious breach of the Court's obligation to ensure a fair hearing is in prospect:
- (a) Does the advocate's duty to the Court *require* him or her to raise the matter so as to try to avoid error arising from a failure properly to ensure a fair trial? or
 - (b) Is the advocate free to make a judgment in his or her client's interest as to whether to raise such a matter, based on the prospect of an appeal being brought or other commercial and tactical considerations?

COMMON ISSUES WHICH ARISE

Adjournments

39. Nothing is more frustrating for a represented party than continual adjournments by an LIP. Cases recognise that it can be appropriate to grant adjournments to permit an LIP to address matters which he or she had not appreciated, or to give

¹⁴ See for example *Szrur v Minister for Immigration* where the failure of the trial judge to invite the applicant to give evidence about a fraud against him by his migration agent raised from the bar table sustained an appeal; see also *McWhinney v Melbourne* at [37]; *Hodder Rook & Associate v Glenworth* where the trial judge's exclusion of the LIP's expert reports on procedural grounds was considered an appealable error: see [62] to [73]; *Lofthus v ANZ* at [29]-[30]

him or her more time to respond to issues raised (as compared to the time a represented party might be granted).¹⁵

40. However, there are limits. In *McWhinney*, the appellant argued that the trial judge erred in not adjourning the trial on his own motion so that he could obtain medical evidence. That was a brave submission, given that the trial judge advised the appellant LIP to adjourn the trial to obtain exactly that evidence, and the LIP rejected that advice. Not surprisingly, the Victorian Court of Appeal was not persuaded that the trial judge had erred.¹⁶
41. Nonetheless, adjournments can be an on-going thorn in the side of the represented party, particularly in respect of applications directed at terminating the proceedings. The writer's experience is that they can infuriate clients who are paying the costs thrown away by repeated chances given to the LIP. The following steps can provide a way for reducing the frequency of adjournments of applications:
- (a) **First**, your client ought to be prepared for the prospect that at least one adjournment will be granted. This is particularly so for matters in applications;
 - (b) **Second**, the application ought to be set down well in advance of the date of service;
 - (c) **Third**, letters should be sent on a regular basis leading up to the hearing date which make clear the nature of the relief sought and invite the provision of material. It is also useful to provide submissions in advance of the hearing;
 - (d) **Fourth**, on the first return date it is important to make clear to the Court all the steps which have been taken to give the LIP respondent a full opportunity to be ready;
 - (e) **Fifth**, for applications, it can assist to set the matter down at the beginning of the 2 week hearing period of the applications judges: this gives the advocate the prospect of the matter returning after the adjournment before the same judge who will have heard the inevitable excuses before.
42. Similar considerations apply in respect of the conduct of a trial. If the represented party delivers objections to evidence and a detailed opening well before trial, the LIP is in a much weaker position to contend that they have been taken by surprise by, or did not foresee, matters raised by the represented party. Further, the more time the LIP has to consider objections and materials, the less justifiable will be arguments that the trial was unfair.

¹⁵ *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343; *DPP v Ozakca* (2006) 68 NSWLR 325

¹⁶ See [26]

43. It is common for objections and detailed openings to be provided in advance to represented opponents in managed cases on the commercial and supervised case lists. It is hard to see why this practice should not be applied to trials against LIPs, where the imperative for clear advance notice of the case to be met is greater. It has been observed to the writer by one senior retired judicial officer that the failure of counsel to provide submissions to LIP opponents well in advance was a matter of particular concern to him and would often result in adjournment.

44. One of the more novel approaches used by some LIPs to procure an adjournment is for the LIP to file and serve notices under s. 78B *Judiciary Act* (Cth). That provision states:

78B Notice to Attorneys-General

(1) Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

(2) For the purposes of subsection (1), a court in which a cause referred to in that subsection is pending:

- (a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;
- (b) may direct a party to give notice in accordance with that subsection; and
- (c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.

45. Courts are astute to prevent abuse of this provision to delay proceedings. A cause does not ‘involve’ a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does. It must be established that the challenge does, indeed, involve a matter arising under the Constitution.¹⁷ An unarguable, frivolous or vexatious Constitutional point is not a matter arising under the Constitution or involving its interpretation.¹⁸

Striking out pleadings and proceedings

46. If a barrister is acting for a client who is opposed by an LIP, it will frequently be possible to strike out the statement of claim or defence. It is a useful step to take:

¹⁷ *Re Finlayson; ex parte Finlayson* (1997) 72 ALJR 73 per Toohey J at 74; see also *DCT v. D. Thomas & Co* (2000) 45 ATR 440 per Atkinson J at 442.

¹⁸ *ACCC v. CG Berbatis Holdings* (1999) 95 FCR 292, per French J at 297.

- (a) A pleading which does not make sense or identify relevant material facts will frustrate the efficient and fair conduct of the proceedings and the trial; and
 - (b) If the LIP is repeatedly unable properly to formulate their claim or defence, the claim is likely to be dismissed, or judgment entered, as the case may be.
47. Notwithstanding the propositions in the cases discussed above emphasising the importance of ensuring so far as possible a fair hearing, the Courts take the view that a proper pleading is essential to the fair and efficient conduct of civil litigation, and that it is unfair to the other party to expect it to put up with a defective pleading just because the litigant is an LIP.
48. The attitude of the Courts is conveniently summarised in *Ross v Hallam* [2011] QCA 92 where Chesterman JA observed¹⁹:

[19] The respondent's prosecution of his action for defamation was frustrated by the appellant's wilful and persistent failures to plead an intelligible defence. Twice the respondent was put to the expense of applying for orders that the document the appellant proffered as a defence be struck out.

[20] In *du Boulay v Worrell and Others* [2009] QCA 63 Muir JA described the appropriate course when dealing with an inept pleading by a litigant in person. His Honour said:

“[69] It may be that self-represented litigants should be afforded a degree of indulgence and given appropriate assistance. But if a self-represented person wishes to litigate, he or she is as much bound by the rules of Court as any other litigant. Those rules exist to facilitate efficient, fair and cost-effective litigation. The Court's duty is to act impartially and ensure procedural fairness to all parties, not merely one party who may be disadvantaged through lack of legal representation. The other party to the litigation is entitled to protection from oppressive and vexatious conduct regardless of whether that conduct arises out of ignorance, mistake or malice.” (footnote omitted)

[21] The effect of the authorities and the relevant rules was aptly summarised by Applegarth J in *Mbuzi v Hall* [2010] QSC 359. His Honour said:

[25] A self-represented litigant, like any other litigant, impliedly undertakes to the Court and to the other parties to proceed in any expeditious way.[7] The purpose of the rules of civil procedure is to “facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense”. [8] The just resolution of the real issues in civil proceedings may on occasions require a judge to give proper assistance to self-represented litigants to ensure that the proceedings are conducted fairly and to avoid “undue delay, expense and technicality”. [9] The proper scope for assistance depends on the particular litigant and the nature of the case. [10] The judge cannot become an adviser to the self-represented litigant, for the role of the judge is fundamentally different to that of a legal adviser. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. [11]”

[22] *Althaus v Australian Meat Holdings Pty Ltd* [2009] QCA 221 affords an example in which the Court of Appeal endorsed the dismissal of an action brought by litigants in person by

¹⁹ See also *McMurdo P* (with whom *Atkinson J* agreed) at [12] to [13]; and *Keane JA* (with whom *Fraser JA* and *Cullinane J* agreed) in *Robertson v Hollings* [2009] QCA 303 at [11]

reason of their serial failure to articulate their case in an intelligible pleading. The same considerations apply to a defence. If a litigant in person cannot persuade the court that he is able to and will plead his case in a manner that complies with the requirements of the Uniform Civil Procedure Rules judgment will be given against him.

[emphasis added]

49. Pleadings by an LIP are frequently defective simply because of lack of legal training of the litigant. The pleading can be illogical, plead irrelevant material, not disclose a cause of action or defence and contain evidence and so on. Pleading is a difficult art and it is not surprising that a novice pleader, burdened with personal involvement in the matter, will struggle.
50. When confronted with a pleading which is self-evidently defective in this way, the temptation is to simply advance a broad and general submission as to its defects. In the writer's view, the preferable approach is to articulate the defects in the pleading with the kind of rigour which would be applied to an application to strike out a pleading settled by counsel or solicitors. Such an approach is likely to give the Court confidence that the strike out order is justified. It also creates a record of the defects in the pleading against which future efforts can be judged in future strike out applications. It is virtually certain that more than one strike out will be required before the proceedings are dismissed.
51. Another kind of defective pleading which is frequently encountered when dealing with LIPs is the 'bizarre' pleading. This is one which raises apparently ridiculous propositions of law or fact. The writer's impression is that such pleadings are reasonably common. They sometimes arise from the home grown obsessions and research of the querulous LIP.
52. More frequently now, they arise from internet based activist groups who propound nonsensical propositions or from websites which provide ill-founded advice about how to beat the tax man or to frustrate a financier. Indications that you might be confronting some such pleading include:
 - (a) Any mention of the Queen or the Magna Carta;
 - (b) The inclusion of allegations that the Court does not have jurisdiction;
 - (c) The inclusion of allegations of a conspiracy;
 - (d) Damages claims which are hugely inflated; and
 - (e) Allegations that everyone involved on your client's side have committed offences (particularly offences that they could not possibly have committed).
53. An example. In the early 2000s, a scheme existed in which tax payers who were served with claims based on unpaid notices of assessment acquired standard form defences. These raised defences including:

- (a) The “*ATO does not exist*” defence²⁰;
 - (b) The “*invalid delegation defence*”²¹;
 - (c) The “*invalid Constitution defence*” and the “*their Queen can’t be our Queen*” defence²²; and
 - (d) (The writer’s favourite) the “*dead monarch defence*”²³.
54. In the writer’s view, in all but the most bizarre cases (and to some extent even in those), it is good advocacy to consider and address the issues raised, albeit sometimes in peremptory terms. Once again, the judge is confronted by the difficulties of dealing with an LIP and it is both consistent with the duty to the Court and with obtaining the best possible outcome from the strike out application to take the time to provide the Court with the assurance that there is nothing in the points raised.
55. A useful tip: vexatious pleadings publicised on the internet and elsewhere have often been considered by other judges elsewhere in the country. It is useful to search some of the more idiosyncratic phrases used because often one will find that the issues have been disposed of by a Court already. This can save a lot of time, particularly with propositions which require some work to demonstrate them to be wrong.
56. Before leaving the question of applications to strike out, two further points are worth making:
- (a) A point to keep in mind is the power of the Court to strike out proceedings as an abuse of process. It is not uncommon for the obsessional LIP to have had a proceeding dismissed, then bring a new proceeding using a different party as plaintiff, identifying a different defendant or advancing different allegations but in respect of the same underlying dispute. Such proceedings can be dismissed as an abuse of process, even if judgment estoppels do not strictly apply.²⁴
 - (b) Further, bizarre and silly allegations in a statement of claim or defence may be characterised as vexatious and an abuse of process simply because of the obvious lack of foundation. This can provide a basis for striking out both pleading and proceeding.²⁵

²⁰ Dealt with by Hill J in *DCT v Levick* 168 ALR 383

²¹ Dealt with in *Levick*

²² Dealt with inter alia by Hayne J in *Joose v DCT* 159 ALR 260 at 263-264

²³ Also dealt with in *Levick*.

²⁴ *Rippon v Chilcotin* [2001] NSWCA 142, at [12] to [33]; *Walton v Gardiner* (1993) 177 CLR 378 at 393.5 per Mason CJ, Deane and Dawson JJ; *Mango Boulevard P/L v. Spencer* [2010] QCA 207; *In Re Cameron* [1996] 2 Qd R 218 at 220

²⁵ *DCT v Levick* 168 ALR 383 at [16]-[17]

Patience in the face of venting by the LIP

57. The NSW Guidelines at [49] make the following observation (footnotes omitted) under the heading “Raising irrelevant matters/submission not justified on the evidence”:

A common complaint is that judges extend too much leniency to self-represented litigants in making submissions. There may be a perception that judges sometimes take the line of least resistance and let the self-represented litigant 'get it off their chest', in circumstances where the barrister's client has been advised that the very matters which are the subject of address by the self-represented litigant are irrelevant or inadmissible. In some instances a self-represented litigant may be seeking to evoke the sympathy of the court by referring to their extraneous life circumstances. In appropriate cases, it is part of a barrister's function to draw the court's attention to an attempt to raise irrelevant issues or to adduce evidence which is outside the pleaded case or to make submissions which go beyond the terms of the pleadings.

58. While it is important to confine the LIP to his or her case in the same way as would be done with a professional opponent, there is always an element of judgment involved in interrupting or responding to matters raised by an LIP. Particularly in plainly unmeritorious cases, judges appear sometimes to adopt the practice of letting the LIP get their grievance off their chest. The writer infers that judges sometimes consider this is important in trying to ensure that the LIP feels they have had a fair hearing.
59. The advocate in that situation needs to be sensitive to the dynamics in the Court room. In the writer's experience, judges do not thank the advocate who pedantically raises every point which could be raised, or seeks to interfere in the monologue.
60. Commercial clients with long experience of LIPs are aware of the special considerations which arise in this situation. However, less experienced clients should be prepared for this kind of situation.

Leave to appear and McKenzie's friends

61. Proceedings involving LIPs can often generate issues relating to the entitlement of the LIP to appear for the party on the record. The most common circumstances where this arises are:
- (a) Where a person wishes to appear on behalf of members of their family; and
 - (b) Where a person who is a director of a company wishes to appear on behalf of the company.

62. While a person has a legal right to appear in person or by a lawyer, a non-lawyer may only appear for another person with leave.²⁶ A company cannot of course appear in person. A company may therefore only appear by a lawyer, unless leave is granted.²⁷
63. The LIP will usually be unaware of the need for leave to appear. In the writer's view it is counsel's duty to raise the matter (even if it would be preferable, in counsel's client's interests, to leave the matter in the hands of the LIP). Others might take a different view. This is not to say that leave has to be opposed. It might suit your client for the LIP to have carriage of the matter.
64. On any application for leave to appear, the Court will be concerned to be satisfied of, at least, the authority of the person to appear on behalf of the other person or company.²⁸ Authority is obviously important to ensuring the binding nature of any steps taken in dealings with the LIP either outside in inside Court.
65. Other factors which will be relevant include:
- (a) The appropriateness of the person to be granted leave, including the objectivity of the person,
 - (b) The complexity of the issues; and
 - (c) The financial resources of the party in respect of whom leave is sought.
66. Financial issues loom particularly large in respect of companies. If a company cannot afford representation but the persons who stand to benefit can, leave may be refused.²⁹
67. Any counsel who has frequent dealings with LIPs will eventually encounter the concept of a McKenzie's friend. It is relied upon by persons who wish to represent others without leave. It is rarely properly understood by the persons who invoke it.
68. The notion of a McKenzie's friend arises out of an English matrimonial case (*McKenzie v McKenzie* [1970] 3 All ER 1034) involving a husband and wife of Jamaican origin. In that case, "a young man called Hanger who was an Australian barrister" attended at the trial with Mr McKenzie. Mr Hanger (our Ian Hanger QC) was not instructed to appear and there was no solicitor on the record. His intention was to sit at the bar table and assist Mr McKenzie to conduct his own case. The trial judge concluded that was not permissible and Mr Hanger had to leave the bar table. The English Court of Appeal overturned that decision (and

²⁶ Section 90 *Supreme Court Act 1991* (previously s. 209 *Supreme Court Act 1995*; now repealed)

²⁷ *ASIC v Neolido Holdings Pty Ltd* [2006] QCA 266 at [59]. Note also that a person can seek leave to appear on behalf of a company under ss 236-237 *Corporations Act*

²⁸ *Molnar Engineering Pty Ltd v Herald & Weekly Times Ltd* 1 FCR 455 at 459

²⁹ *VN International Video v West End HKTVB Video* 14 ACLC 1,308 at 1,310-1,311; *Simto Resources Ltd v Normandy Capital Ltd* 11 ACLC 856; *ASIC v Neolido Holdings Pty Ltd* [2006] QCA 266 at [59]

the judgment in favour of the wife on a key issue). Davies LJ observed (footnotes omitted):

Counsel for the husband has submitted to this court, in my opinion rightly, that the learned judge was wrong in taking that course. Mr. Hanger was not there to take part in the proceedings in any sort of way. He was merely there to prompt and to make suggestions to the husband in the conduct of his case, the calling of his witnesses and, perhaps more importantly, on the very critical and difficult questions of fact in this case, to assist him by making suggestions as to the cross-examination of the wife and her witnesses.

Our attention was called by counsel for the husband to some words of Lord Tenterden CJ used many years ago in *Collier v. Hicks*. I need not go in any detail into the question of fact which arose in that case. Very shortly, it was that somebody wished to appear before a magistrates' court and he was turned out. An action of trespass was subsequently brought. In the course of giving the first judgment in that case, Lord Tenterden said:

“Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.”

69. The writer's experience with LIPs and McKenzie's friends is that it is rare for a person to have the luck that Mr McKenzie had in being offered the assistance of Mr Hanger. Persons who seek to involve themselves as McKenzie's friends are often persons who have counselled the LIP as to the way to respond to the proceedings and/or who wish to use the proceedings to promote their own frequently peculiar views. Others are persons who are family members or friends whose main quality is a determined view that their friend or loved one is in the right.
70. It is therefore useful to observe that there is no absolute right in an LIP to have the assistance of a McKenzie's friend. Whether to permit a person to advise as a McKenzie's friend is a matter of practice and procedure within the discretion of the judge conducting the hearing.³⁰ In criminal cases, Courts will be acutely aware of the difficulties for the proper conduct of a criminal trial which can arise from the practice.³¹ Obvious factors which disqualify a person from that role include that they have been struck-off as legal practitioners, will be called to give evidence or are known to contend for untenable arguments. It has been recognised that such 'friends' are “potentially undisciplined and disruptive and beyond direct access in a disciplinary and controlling sense”.³²

³⁰ *Cronis v Jilt Pty Ltd* [2013] 1 Qd R 104 at [48]; *Phillips v Hearne* [2015] QCA 236 at [15]; *Cristovao v Butcher Paull & Calder* [2006] WASCA 184 at [3]

³¹ *R. v Burke* [1993] 1 Qd R 166 following *Smith v. The Queen* (1985) 159 C.L.R. 532, 534: It is respectfully suggested that *R v Burke* contains a useful summary of the law on the matter to that time, including an interesting review of the difficulties which emerged in NSW with the practice.

³² *Re B* [1981] 2 NSWLR 372 per Moffit JA at 385-386

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